Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes Landlord: MNDCL-S, FFL
Tenant: MNDCT, OLC

Introduction

This hearing dealt with cross-applications filed by the parties pursuant to the Residential Tenancy Act (the Act).

The Landlord's application was made on May 4, 2022. The Landlord seeks the following relief:

- a monetary order for compensation for monetary loss or other money owed;
- an order permitting the Landlord to retain the security deposit; and
- an order granting recovery of the filing fee.

The Tenant's application was made on March 30, 2022. The Tenant seeks the following relief:

- a monetary order for compensation for monetary loss or other money owed; and
- an order that the Landlord comply with the Act, Residential Tenancy Regulation (the Regulation), and/or the tenancy agreement.

The Landlord was represented at the hearing by WM and DM, agents. The Tenant attended the hearing on her own behalf. WM, DM, and the Tenant provided affirmed testimony.

On behalf of the Landlord, WM testified that the Landlord's Notice of Dispute Resolution Proceeding package was served on the Tenant by registered mail on May 13, 2022. The Tenant acknowledged receipt.

The Tenant testified that the Tenant's Notice of Dispute Resolution Proceeding package and two subsequent evidence packages were served on the Landlord by registered mail and by email. WM acknowledged receipt but noted the Tenant did not provide a monetary order worksheet. However, although not on the correct form, it as noted that the Tenant provided a type-written summary of the claim and the hearing proceeded without objection on this basis.

No further issues were raised with respect to service or receipt of the above documents during the hearing. The parties were in attendance or were represented at the hearing and were prepared to proceed. Therefore, I find the above documents were sufficiently served for the purposes of the Act.

The parties were advised that Rule of Procedure 6.11 prohibits the recording of dispute resolution hearings. All in attendance confirmed the hearing was not being recorded.

The parties were provided with a full opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure and to which I was referred. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to a monetary order for compensation for monetary loss or other money owed?
2. Is the Landlord entitled to an order permitting the Landlord to retain the security deposit?
3. Is the Landlord entitled to an order granting recovery of the filing fee?
4. Is the Tenant entitled to a monetary order for compensation for monetary loss or other money owed?
5. Is the Tenant entitled to an order that the Landlord comply with the Act, Regulation, and/or the tenancy agreement?

Background and Evidence

The parties agreed the fixed-term tenancy began on July 1, 2021. Although the tenancy was expected to continue to June 30, 2022, the parties agreed the tenancy before the end of the fixed term on April 30, 2022. At all material times, rent of $2,010.00 per month was due on the first day of each month. The Tenant paid a security deposit of $1,005.00 and a pet damage deposit of $1,005.00, which the Landlord holds pending the outcome of this hearing. A copy of the tenancy agreement was submitted into evidence.

The Landlord's Claim

The Landlord claims liquidated damages of $2,010.00. As noted above, the parties agreed the Tenant ended the tenancy on April 30, 2022, before the end of the fixed term. WM referred to Clause 18 of the addendum to the tenancy agreement which states:

> **18. LIQUIDATED DAMAGES.** If the Tenant ends the fixed term tenancy before the original term as set out in the Agreement…the Landlord may treat this Agreement as being at an end. In such an event, an equivalent of one month's rent must be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the Landlord's cost of re-renting the Rental Unit and must be paid in addition to any amounts owed by the Tenant (such as but not limited to unpaid rent or for damage to the Rental Unit and/or residential premises). The liquidated damages amount is an agreed genuine and reasonable pre-estimate of the Landlord's administrative costs of advertising and re-renting the Rental Unit as a result of the Early Termination. Payment of liquidated damages does not preclude the Landlord from exercising any further right to recovering any other damages or remedies from the Tenant.

In reply, the Tenant testified that a number of issues arose during the tenancy which amounted to a breach of a material term of the tenancy agreement. As a result, the Tenant maintains she was justified in ending the tenancy before the end of the fixed term.

The Tenant's complaints were summarized in an email to the Landlord dated October 26, 2021, a copy of which was submitted into evidence. In it, the Tenant described smoking by other tenants in the building. The Tenant testified that the smoke impacted the health of the Tenant and her daughter but did not refer to any documentary evidence in support.

The Tenant also testified there was poor soundproofing and that she could hear parties in the adjacent units and her neighbours having sex. The Tenant testified that her sleep was interrupted and that she occasionally had to sleep on the couch.

The October 26 email also referred to the condition of the building and grounds. The Tenant complained of "garbage littered everywhere", dog feces, poor lawn maintenance, and potentially dangerous mushrooms growing on the lawn.

The October 26 email also referred to issues with parking. The Tenant testified that she paid $75.00 per month for secured underground parking but that it was not secure most of the time. The Tenant testified that people parked in fire lanes and in disabled parking areas. The Tenant testified that she constantly asked the Landlord to correct these issues.

The Tenant also referred to an email to the Landlord dated January 15, 2022 but was unable to direct me to the document during the hearing. In any case, the Tenant testified that the issues raised in the October 26 email had not been resolved at that time.

The Tenant testified that smoking in the building was the "biggest thing", but that noise was also a "major issue". The Tenant testified that she had to move when she did for her family's safety and for their state of mind.

In response, WM acknowledged that, as a newly constructed and rented building, there were a lot of things to iron out, including a change in ownership and management. WM testified that the Landlord responded to issues as they arose. WM provided several examples. First, WM testified that building manager took steps to enforce the non-smoking policy. WM referred to notices dated June 8 and July 20, 2021, which were posted on tenant's doors. Copies of the notices were submitted into evidence.

Second, with respect to the Tenant's complaints of noise in the rental property, WM testified that these issues were addressed by the building manager and that at least one tenant was evicted due to noise complaints.

Third, with respect to security, WM testified that the Landlord hired private security for the underground parking when issues of security arose.

Fourth, the Landlord had laneways painted to ensure parking and access were protected. However, WM acknowledged that this was not done until the weather improved and permitted the paint to adhere to the concrete.

WM also referred to a notice to all tenants dated January 19, 2022 as evidence that the issues raised by the Tenant were being addressed and that the tenants were being kept informed of developments. The notice submitted provided an update regarding parking, security, pet waste, storage lockers, and gyms.

WM also noted that the Tenant's notice to end the tenancy made no reference to breach of a material term of the tenancy agreement and asserted that the issues raised did not amount to a breach of a material term in any event.

The Tenant's Claim

First, the Tenant claims half the rent paid during the 10 months of the tenancy. The Tenant acknowledged that the amount set out on the Tenant's description of the claim is incorrect and that the actual amount sought is $10,050.00 ($1,005.00 x 10). The evidence of the Tenant and Landlord concerning the Tenant's issues is described in greater detail above.

Second, the Tenant claims $300.00 for 4 months of secure parking, which the Tenant asserts was not secure. In reply, DM acknowledged there were significant issues with the parking but that the Landlord addressed this issue by hiring security.

Third, the Tenant claims $75.00 for one month of not having a functioning dishwasher in December 2021. In reply, DM testified that the Tenant is correct and that one month is "way too long" to deal with an issue like a faulty dishwasher.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Section 67 of the Act empowers the director to order one party to pay compensation to the other if damage or loss results from a party not complying with the Act, Regulation, or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the Act. An applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss because of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss

In these cases, the burden of proof is on each party to prove the existence of the damage or loss, and that it stemmed directly from a violation of the Act, regulation, or tenancy agreement on the part of the other party. Once that has been established, the party must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the party did what was reasonable to minimize the damage or losses that were incurred.

The Landlord's Claim

With respect to the Landlord's claim for $2,010.00 for liquidated damages, Policy Guideline #4 states:

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into,

otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

In this case, I find the Tenant breached the fixed-term agreement by terminating the tenancy on April 30, 2022, before the end of the fixed term. Although I accept that a number of issues arose during the tenancy, I am not satisfied that they amount to a breach of a material term of the tenancy agreement that justifies an early end to the tenancy. Section 45 of the Act only permits a tenant to end a tenancy early if a landlord fails to comply with a material term of the tenancy agreement and does not correct the situation within a reasonable period after the tenant gives written notice of the failure. I find I am satisfied that the Landlord took steps to address the Tenant's complaints within a reasonable period after receiving notice.

I also find that the amount of the liquidated damages claimed, while on the higher end, is not extravagant or oppressive and is not a penalty. As stated at Clause 18, the amount is "to cover the Landlord's cost of re-renting the Rental Unit…[and] is an agreed genuine and reasonable pre-estimate of the Landlord's administrative costs of advertising and re-renting the Rental Unit as a result of the Early Termination." Therefore, I find the Landlord has established an entitlement to recover liquidated damages of $2,010.00, as provided for in the tenancy agreement.

Having been successful, I find the Landlord is also entitled to recover the $100.00 filing fee paid to make the Landlord's application. I also order that the Landlord is entitled to retain the security deposit in partial satisfaction of the claim.

Pursuant to section 67 of the Act, I find the Landlord is entitled to a monetary award of $100.00, which has been calculated as follows:

Claim	**Allowed**
Liquidated damages:	$2,010.00
Filing fee:	$100.00
LESS security deposit and pet damage deposit:	($2,010.00)
TOTAL:	**$100.00**

The Tenant's Claim

With respect to the Tenant's claim for $10,050.00 for issues with smoking, noise, property maintenance, and parking, I find there is insufficient evidence before me to grant the amount claimed. While I accept that issues arose during the tenancy, I find that the Landlord responded to the Tenant's complaints in a reasonable and timely

manner, and that the Landlord did not breach the Act. The Tenant also provided no submissions in support of the amount claimed. Further, although the Tenant testified that she contacted the Residential Tenancy Branch to discuss the matter, she did not make an application for dispute resolution to obtain an order requiring the Landlord to address the issues. I find it is more likely than not that the Tenant was aware of her right to make an application for dispute resolution but elected not to do so. This aspect of the Tenant's application is dismissed.

With respect to the Tenant's claim for $300.00 for the cost of inadequate secured parking, I find there is insufficient evidence before me to grant the relief sought. Rather, I find that, despite the evidence of DM who testified that issues with the underground parking were significant, I am satisfied that the Landlord hired a security company to address this issue. This aspect of the Tenant's application is dismissed.

With respect to the Tenant's claim for $75.00 for the loss of use of the dishwasher for one month, I find there is sufficient evidence before me to grant the relief claimed. The Tenant testified that she did not have the use of the dishwasher for approximately one month in December 2021, and DM acknowledged this was "way too long" to deal with this issue. As a result, I find the Tenant has demonstrated an entitlement to a monetary award of $75.00, which I find to be reasonable in the circumstances.

Considering the above, I order that the Tenant's request for an order that the Landlord comply with the Act, Regulation, and/or the tenancy agreement is dismissed without leave to reapply.

Monetary Awards and Set-Off

The Landlord has demonstrated an entitlement to a monetary award of $100.00.

The Tenant has demonstrated an entitlement to a monetary award of $75.00.

Setting off these amounts, I find the Landlord is entitled to a monetary order in the amount of $25.00 ($100.00 - $75.00 = $25.00).

Conclusion

The Landlord is granted a monetary order in the amount of $25.00. The order may be filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Residential Tenancy Act.

Dated: July 20, 2022

Residential Tenancy Branch